

TAX & EXCHANGE CONTROL ALERT

IN THIS ISSUE

DEMAND LOANS, PRESCRIPTION AND TAX

In South Africa, generally, debts prescribe within three years from the date on which they become due.

CUSTOMS HIGHLIGHTS

This week's selected highlights in the Customs and Excise environment since our last instalment.

DEMAND LOANS, PRESCRIPTION AND TAX

The debtor argued that prescription began running when the loan amount was advanced. The creditor argued that prescription only began running when the creditor made a written demand for payment.

The Constitutional Court held that, unless the parties agree otherwise, a loan repayable on demand is due from the moment the advance is made, and that no specific demand for repayment needs to be made for the loan to be immediately due and repayable.



In South Africa, generally, debts prescribe within three years from the date on which they become due.

If a person advances money or credit to another person without a fixed date for repayment, unless the parties agree otherwise, the debt becomes due on the date of the conclusion of the agreement. However, what is the position in the case of a so-called "demand loan", that is, a loan agreement in terms of which the creditor has the power – by making demand – to unilaterally determine when the debtor must perform?

That question was at issue in the Constitutional Court case of *Trinity Asset Management (Pty) Ltd v Grindstone Investments 132 (Pty) Ltd* 2018 (1) SA 94 (CC).

In that case, the creditor advanced an amount of money to the debtor in terms of a simple written loan agreement. The salient term of the agreement was the following:

The Loan Capital shall be due and repayable within 30 days from the date of delivery of the Lender's written demand.

The debtor argued that prescription began running when the loan amount was advanced. The creditor argued that prescription only began running when the creditor made a written demand for payment.

The majority of the judges in the Constitutional Court held that, unless the parties agree otherwise, a loan repayable on demand is due from the moment the advance is made, and that no specific demand for repayment needs to be made for the loan to be immediately due and repayable. Accordingly, prescription begins to run when the advance is made, unless there is a clear indication to the contrary.

However, the Court added the following (at paragraph [125]):

Ultimately, it is a question of fact whether the parties intended demand to be a condition precedent for the debt to be "due". Loubser [an academic in a leading textbook] postulates the vivid example of a family trust. Say you make a loan to a close relative, your daughter, or your father. The daughter is studying. Or the parent is hard up. The circumstances show that the loan is on the never-never. The debt won't be due, in any sense, legal, technical or practical, until you say, "Please won't you pay back". In that case, it is clear that the parties intend demand to be a condition precedent to repayment. The parties do not intend the debt to be "due" until demand is made.

(Footnotes omitted.)

Who's Who Legal

Emil Brincker has been named a leading lawyer by Who's Who Legal: Corporate Tax – Advisory and Who's Who Legal: Corporate Tax – Controversy for 2017.

Mark Linington has been named a leading lawyer by Who's Who Legal: Corporate Tax – Advisory for 2017.

DEMAND LOANS, PRESCRIPTION AND TAX

CONTINUED

It appears from the Trinity Asset Management case that, unless a creditor and a debtor who are in a special relationship agree otherwise, it is likely that a debt between them cannot prescribe, unless the creditor makes demand.



Now, the prescription of a debt may give rise to tax consequences. For example: if a taxpayer bought trading stock from a supplier; and if the taxpayer deducted the price of the stock for income tax purposes. If the supplier forgets to claim payment for the stock from the taxpayer and the claim accordingly prescribes – then the taxpayer may conceivably realise a taxable recoupment or recovery in his hands, in terms of s8(4)(a) of the Income Tax Act, No 58 of 1962 (Act) (compare *Omnia Fertilizer Limited v C:SARS* 2003 (4) SA 513 (SCA)).

Conceptually, also, if a creditor purposefully allows a debt to prescribe (for example, in the case of a father who has made a loan to his daughter), the creditor may become liable for donations tax if the action of the taxpayer could be said to constitute “the gratuitous waiver or renunciation of a right” (see definition of “donation” in s55 of the Act).

The judgment in the *Trinity Asset*

Management case appears to have created some confusion for taxpayers, especially in the case where the parties are in a special relationship, for example where a founder of a trust has made a demand loan to a trust, or a holding company has made a demand loan to its subsidiary.

However, it appears from the *Trinity Asset Management* case that, unless a creditor and a debtor who are in a special relationship agree otherwise, it is likely that a debt between them cannot prescribe, unless the creditor makes demand.

For example: A holding company has sold stock to its wholly-owned subsidiary, a start-up. The price of the stock is left owing on interest-free loan account with no fixed terms of repayment. The subsidiary deducted the price of the stock for income tax purposes. The loan account has been owing for a period of five years. Due to cash flow constraints, the subsidiary has not been in a position



Best Lawyers 2018 South Africa Edition

Included 53 of CDH's Directors across Cape Town and Johannesburg.

Recognised Chris Charter as Lawyer of the Year for Competition Law (Johannesburg).

Recognised Faan Coetzee as Lawyer of the Year for Employment Law (Johannesburg).

Recognised Peter Hesseling as Lawyer of the Year for M&A Law (Cape Town).

Recognised Terry Winstanley as Lawyer of the Year for Environmental Law (Cape Town).

Named Cliffe Dekker Hofmeyr Litigation Law Firm of the Year.

Named Cliffe Dekker Hofmeyr Real Estate Law Firm of the Year.

DEMAND LOANS, PRESCRIPTION AND TAX

CONTINUED

Each demand loan should be considered separately in the light of its terms and all the relevant facts to determine whether it has prescribed and, accordingly, whether tax consequences have arisen.



to repay the loan amount. The holding company has also not demanded repayment of the loan account.

It could be argued that in this scenario, it was not the intention that the debt (the price of the stock) would become due when the loan account arose. It could be argued that the holding company provided credit to the subsidiary on the "never never". In other words, the parties likely intended that demand would be a condition precedent to repayment, that is, that the debt would be "due" the moment demand is made. Accordingly, the loan account would not have prescribed within three years of the date that the stock was supplied; the loan account would only

prescribe within three years from the date that the holding company demands repayment of the loan account. And, accordingly, the subsidiary would only suffer a taxable recoupment or recovery if and when the loan were to prescribe in that manner, and not before.

It is apparent that each demand loan should be considered separately in the light of its terms and all the relevant facts – notably the relationship between the creditor and debtor – to determine whether it has prescribed and, accordingly, whether tax consequences have arisen.

Ben Strauss



CUSTOMS AND EXCISE HIGHLIGHTS

Please note that this is not intended to be a comprehensive study or list of the amendments, changes and the like in the Customs and Excise environment, but merely selected highlights which may be of interest.

In the event that specific advice is required, kindly contact our Customs and Excise specialist, Director, Petr Erasmus.



This week's selected highlights in the Customs and Excise environment since our last instalment:

1. Amendments to Rules to the Customs & Excise Act, No 91 of 1964 (Act) (certain sections quoted from the SARS website):
 - 1.1 Amendment of Rule 64E.12 and 64E.14 to the Act which serves to increase the benefits for level 2 accredited clients.
2. Amendments to Schedules to the Act:
 - 2.1 Schedule 1:
 - 2.1.1 General Notes to Schedule No. 1, by the substitution of Table 1 in paragraph 3.1 to Note IJ to implement the SACU allocation of cheese tariff rate quota under the EPA agreement between the EU and SADC EPA states with retrospective effect from 1 January 2018.
 - 2.2 Schedule 2:
 - 2.2.1 The deletion of items 215.02/7318.15.39/01.08, 215.02/7318.15.39/02.08 and 215.02/7318.15.39/03.08 to terminate anti-dumping duties on fully threaded screws with hexagon heads originating in or imported from the People's Republic of China, with retrospective effect from 15 November 2017.
3. SARS issued a circular dated 8 May 2018 wherein external stakeholders were advised as follows (certain sections quoted from the circular):
 - 3.1 SARS is on the verge of implementing the first phase of the Customs Sufficient Knowledge (CSK) assessment process which falls under the New Customs Acts Programme (NCAP).

The CSK is a Customs Control Act (CCA) prerequisite for certain client types to have CSK for registration and licensing purposes on the RLA system. The initial rollout of CSK will go live on 11 May 2018 for the following CCA registration and licensing client types only: Local Road carriers, Own Goods Carriers: Road, Local Road Couriers, General Customs Brokers, Courier Customs Brokers and Registered Agents: Road Carriers (non-local).

As the CCA has not yet been operationalised, taking the test will not be mandatory at this stage. However, clients are encouraged to write the test as it will assist them to become familiar with the new legislation to avoid consequences stemming from non-compliance in the future.

CUSTOMS AND EXCISE HIGHLIGHTS

CONTINUED

In the event that specific advice is required, kindly contact our Customs and Excise specialist, Director, Petr Erasmus.



The test will be written online at various SARS venues around the country. However, in the early phase, SARS will enable limited test venues and will be extending venue schedules according to a phased roll-out plan. From 14 May, clients will be able to book to take the test as per available schedules on the CSK system. When clients go on the CSK application via eFiling to nominate and book, the schedule will indicate which venues are available on which dates.

.....

For more information you can go to the SARS website > Customs & Excise > New Customs Legislation Update > CSK or click here: <http://www.sars.gov.za/ClientSegments/Customs-Excise/AboutCustoms/Pages/Customs-Sufficient-Knowledge-Test-FAQs.aspx>. If you have any questions, please mail us on NewCustomsActs@sars.gov.za.

4. The International Trade Administration Commission has done the following (certain sections quoted from the notices):
 - 4.1 Per notice on 20 April 2018 decided to proceed with an investigation for remedial action in the form of a safeguard against the increased imports of other screws fully threaded with hexagon heads made of steel classified under tariff subheading 7318.15.39.

All information submitted, including non-confidential copies thereof, should be received by the Senior Manager: Trade Remedies by no later than 20 days from the date of the notice.

Should you have any queries, please contact Mr Zuko Ntsangani at telephone number (012) 394 3662 or Ms Mosa Sebe at telephone number (012) 394 1850 or at fax (012) 394 0518.

- 4.2 Received the following application concerning Customs Tariff:

- 4.2.1 Per notice dated 20 April 2018, for the creation of a rebate facility for Caustic Soda classifiable under tariff subheading 2815.12 for the extraction of Copper and Nickel classifiable under tariff headings 2603.00 and 2604.00.

Representation should be submitted within four (4) weeks of the date of the notice.

- 4.2.2 Per notice dated 20 April 2018, an increase in the rate of duty on "Diphosphorus Pentaoxide; Phosphoric Acid; Polyphosphoric Acids, Whether Or Not Chemically Defined: Of a phosphorous content of 78 per cent or more", classifiable under tariff subheading 2809.20.10, from free of duty to 10 per cent ad valorem.

CUSTOMS AND EXCISE HIGHLIGHTS

CONTINUED

In the event that specific advice is required, kindly contact our Customs and Excise specialist, Director, Petr Erasmus.

For enquiries contact:

Mr C Sako,

Tel: (012) 394 3669,

Email: csako@itac.org.za,

or Ms T Morale,

Tel: (012) 394 3694,

Email: tmorale@itac.org.za.

5. The following notices were published in the Government Gazette:

5.1 Notice 186 of 2018 (of 20 April 2018) relating to the Agricultural Product Standards Act No. 119 of 1990, which states as follows:

the standards and requirements regarding control of the export of Avocados ... are hereby further amended.

.....

shall come into operation seven days after publication of this notice.

5.2 Notice 468 dated 4 May 2018, relating to the Agricultural Product Standards Act No. 119 of 1990, which states as follows:

the standards and requirements regarding control of the export of Citrus fruits ... are hereby further amended;

.....

shall come into operation seven days after publication of this notice.

Petr Erasmus



CHAMBERS GLOBAL 2018 ranked our Tax & Exchange Control practice in Band 1: Tax.

Gerhard Badenhorst ranked by CHAMBERS GLOBAL 2014 - 2018 in Band 1: Tax: Indirect Tax.

Emil Brincker ranked by CHAMBERS GLOBAL 2003 - 2018 in Band 1: Tax.

Mark Linington ranked by CHAMBERS GLOBAL 2017- 2018 in Band 1: Tax: Consultants.

Ludwig Smith ranked by CHAMBERS GLOBAL 2017 - 2018 in Band 3: Tax.

OUR TEAM

For more information about our Tax & Exchange Control practice and services, please contact:



Emil Brincker
National Practice Head
Director
T +27 (0)11 562 1063
E emil.brincker@cdhlegal.com



Mark Linington
Private Equity Sector Head
Director
T +27 (0)11 562 1667
E mark.linington@cdhlegal.com



Jerome Brink
Senior Associate
T +27 (0)11 562 1484
E jerome.brink@cdhlegal.com



Gerhard Badenhorst
Director
T +27 (0)11 562 1870
E gerhard.badenhorst@cdhlegal.com



Candice Gibson
Senior Associate
T +27 (0)11 562 1602
E candice.gibson@cdhlegal.com



Petr Erasmus
Director
T +27 (0)11 562 1450
E petr.erasmus@cdhlegal.com



Gigi Nyanin
Senior Associate
T +27 (0)11 562 1120
E gigi.nyanin@cdhlegal.com



Dries Hoek
Director
T +27 (0)11 562 1425
E dries.hoek@cdhlegal.com



Varusha Moodaley
Senior Associate
T +27 (0)21 481 6392
E varusha.moodaley@cdhlegal.com



Heinrich Louw
Director
T +27 (0)11 562 1187
E heinrich.louw@cdhlegal.com



Louis Botha
Associate
T +27 (0)11 562 1408
E louis.botha@cdhlegal.com



Ben Strauss
Director
T +27 (0)21 405 6063
E ben.strauss@cdhlegal.com



Mareli Treurnicht
Director
T +27 (0)11 562 1103
E mareli.treurnicht@cdhlegal.com

BBBEE STATUS: LEVEL TWO CONTRIBUTOR

Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 2 BBBEE verification under the new BBBEE Codes of Good Practice. Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

JOHANNESBURG

1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa. Dx 154 Randburg and Dx 42 Johannesburg.
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

CAPE TOWN

11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

©2018 2362/MAY

